

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Broadcast Localism

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MM Docket No. 04-233
FCC 07-218

TO: THE COMMISSION

**Supplemental Comments of National Religious Broadcasters to
Report on Broadcast Localism and Notice of Proposed Rulemaking**

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Office of the Secretary

*A member in good standing of the bar of the Supreme Court of the United States, and a member in good standing of the bar of the Virginia Supreme Court, as well as a member of various courts in other jurisdictions; Mr. Parshall's bar licensing complies with 47 CFR 1.23(a).

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SUMMARY AND INTRODUCTION

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic media open and accessible for religious broadcasters. We have more than 1400 members, most of whom are radio and television broadcasters that produce and/or telecast religious programming. Of those, a significant number are licensees with either single or multiple stations, all of which will be impacted negatively by several proposal contained within the Report on Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233, January 24, 2008 ("NPRM").

In our previously filed Comments of National Religious Broadcasters to Report on Broadcast Localism and Notice of Proposed Rulemaking ("NRB Comments"), March 4, 2008, we addressed the three proposed rules which we opposed for reasons that warrant our restating them here verbatim:

1. Mandated Community Advisory Boards, NPRM, ¶ 25. We oppose this suggestion because: (a) it limits the flexibility and creativity licensees need to find the best way to determine local issues; (b) being imposed as a government "mandate," it therefore would create an unrealistic expectation of empowerment in the board representatives selected, and would place administrative pressures on a licensee who may have legitimate broadcasting reasons for not agreeing to certain programming demands that are made; (b) government mandated advisory boards will decrease rather than increase the willingness of licensees to take risks regarding the diversity of opinion of those whom they invite on such boards; (c) it will reduce the issue of localism to

the mere running of a mandated advisory board bureaucracy, and will thereby lower rather than raise the bar for licensee creativity in determining local needs; (d) it violates the Religion Clauses of the First Amendment; and (e) it ignores the myriad ways in which broadcasters can use everyday technology, and creative, individualized approaches, to invite public participation in programming and assessment of community needs outside of a formal “board” structure.

2. Mandated staffing of each broadcast facility during all hours of operation. NPRM, ¶ 29. We oppose this proposal because (a) it will financially devastate many of our broadcasters, (b) it will unduly burden those of our broadcasters with multiple facilities within close proximity of each other who have staff at some locations and use automation for others; (c) the Commission does not cite any facts indicating how this rule would advance “localism” or serve the public interest; (d) the Commission’s sole examples of severe weather or emergencies requiring the physical presence of staff at broadcast facilities to insure public warnings, are based on an unsubstantiated hypothesis, with no actual problem cases cited, and such examples are currently handled very effectively on a remote automated EAS system, or with other technological tools that keep live staff “on call,” as the experience of our broadcast members indicates; and (e) will force many broadcasters currently broadcasting around-the-clock, who cannot afford to pay for extra staff or over-time compensation during “all

hours of operation” to begin cutting back broadcast hours, thus decreasing, rather than increasing, service to the public.

3. New mandates for localism content in programming as a condition of licensure. SFNPRM, ¶ 124. We oppose this recommendation because (a) it would violate the First Amendment: (b) it is based on an unworkable system where the Commission would try to define what it truly “local” programming in matters of news, public affairs, culture, and entertainment and then punish offending broadcasters whose view of broadcasting journalism may be different from the Commission’s official “orthodoxy,” and (c) it would necessarily require the Commission to construe and then apply vague, ambiguous standards of “localism,” thus encouraging the Commission and its agents, even unknowingly, to make licensure decisions based on purely subjective views of the value of certain reasonably debatable types of programming.

NRB Comments, pages 3-5. In these Supplemental Comments, NRB expands on our positions regarding these issues

I. DISCUSSION

A. “Religious Broadcasters” Must be Expressly Exempted from Mandated Community Advisory Boards

The Commission has suggested that each broadcaster should “convene a permanent advisory board made up of” representatives and leaders of “all segments of the community.” NPRM, ¶ 26. The stated purpose would be to “help inform the stations’

programming decisions,” and create “improved access by the public to stations decision makers.” NPRM, ¶ 25. Meetings would presumably be at least quarterly. *Id.*

We have previously explained our strenuous constitutional, policy, and practical objections to this kind of requirement being imposed on religious broadcasters. NRB Comments, pages 5-10.

What rule, therefore, should the Commission adopt regarding the proposal of mandated community advisory boards? We strongly recommend the following:

The rules regarding instituting regular meetings with a “board of community advisors,” shall not apply to religious broadcasters [and non-commercial broadcasters].

While the Commission may find merit in determining that non-profit broadcasters should be exempted from regulations regarding a “board of community advisors,” or other “localism” requirements, we believe that, regardless of that, “religious broadcasters” need to be exempted *expressly* from such regulations, and not simply subsumed within the category of non-commercial or non-profit broadcasters. We say this for several reasons.

First, we propose that “religious broadcasters” specifically be exempted so as to create a consistency of purpose and language with, and to follow the precedent of, the 2002 Second Report and Order of the Commission that dealt appropriately with an equivalent issue, one that had the potential of negatively impacting religious broadcasters in a similar way: namely, in the field of EEO rules regarding employment practices. See: *In the Matter of Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) (“Second Report and Order”) ¶ 50, n.99, citing the *Report and Order*, ¶ 157-161, 15 FCC Rcd at 2392-93.

In ¶ 50 of the 2002 Second Report and Order dealing with EEO matters, the Commission noted that it had defined a “religious broadcaster” as “a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity ...”¹ Thus, “religious broadcasters” were expressly exempted from the regulations that otherwise would have applied regarding employment relations with persons based on the category of “religious belief or affiliation;” furthermore, religious broadcasters have been permitted to establish faith-based conditions as a job qualification for all station employees. *Id.*, ¶ 49. Even further, the Commission specifically *declined* the invitation to treat, separately, religious broadcasters who were *commercial* in nature as opposed to non-commercial. Instead, the Commission decided to utilize a “totality of the circumstances” approach in determining whether a specific licensee was a “religious broadcaster” based on a number of different factors (non-profit vs. commercial, religious history of the station, articles of incorporation as setting forth a religious purpose, and whether it carried religious content in programming). *Id.*, ¶ 50.

Beyond that, the Commission also noted that, under its test, it would entertain the possibility that “an entity could, based on the totality of the circumstances, qualify as a ‘religious broadcaster’ even if it operated as a for-profit entity or lacked an extensive religious history.” *Id.* Thus, in the established nomenclature of the Commissions rulings, in order to qualify as a “religious broadcaster[,]” an entity need not *necessarily* be a non-profit broadcaster.

¹ We note that two of the Commissioners in the current Commission, Michael J. Copps and Chairman Kevin J. Martin were also Commissioners at the time of the 2002 Second Report and Order.

We would thus urge that in this Localism proceeding, the Commission create an express exemption for “religious broadcasters,” which is a category previously established by the Commission in a similar context.

Furthermore, the separate category of “religious broadcasters” has *not* created any definitional or administrative problems for the Commission. As the Commission itself noted in the 2002 Second Report and Order, “[w]e have encountered few problems concerning the definition of religious broadcaster since we initiated the policy [in the EEO context].” *Id.*

The use of our proposed exemption language has considerable merit because (1) It protects the First Amendment rights of all religious broadcasters (not just non-profits) to be free from excessive entanglement with government (see: NRB Comments pages 8-9); (2) The intrusive impact of forcing religious broadcasters to meet and confer with a “board of community advisors” on programming ideas and content is similar to the intrusion that would have occurred by forcing “religious broadcasters” to comply with EEO employment regulations of non-discrimination on the basis of religion; however, that intrusion was successfully averted by special treatment for “religious broadcasters” in the EEO context in 2002 Second Report and Order. A similar unconstitutional intrusion could likewise be averted in the “community advisory board” context by utilizing the same type of exemption here. (3) An exemption of, for instance, all “non-profit” or “non-commercial” broadcasters but without an explicit exemption for “religious broadcasters” is woefully insufficient because (a) it represents a retreat by the Commission from the 2002 approach which afforded a full-dimensional respect of the religious freedom rights of all religious broadcasters, and (b) it would ignore the fact that

several member broadcasters of National Religious Broadcasters would be *excluded*: several of our religious broadcasters are commercial in structure, and yet also carry a predominance of religious programming, e.g., Blount Communications (a small radio network in the North East), and Bott Radio Network (a medium sized radio network in the Mid West).

B. A Mandate for Around-the-Clock Staffing at Each Broadcast Facility should be Replaced with a Rule that Recognizes those Current Practices that Utilize Technology Successfully as a Means of Meeting Local Emergency Needs Remotely

The Commission is considering mandating licensees to staff each broadcast facility during all hours of operation. NPRM, ¶ 29. We have argued against this. See: NRB Comments, pages 10-12.

The Commission cites, as a basis for this proposed rule, the need to provide local warnings of “severe weather” or “local emergency.” NPRM ¶ 29.

NRB recommends, rather than the proposed rule, the following:

A broadcaster shall not be required to maintain staff physically at any broadcasting facility during its hours of operation, if it maintains a system reasonably designed to transmit, to the public, emergency information relating to severe weather or other similar emergency conditions in a prompt and effective manner, including, by way of example: (a) the use of automatic relays, of weather warnings from NOAA, local emergency announcements, or state and national alerts, where such warnings or notices can be aired directly without the presence of staff; (b) providing the broadcaster’s phone numbers and passwords to its EAS system to the appropriate local municipal emergency departments; (c) automated systems designed to interrupt normal programming with any EAS announcement and, in the case of television, to provide a graphic crawler of the message from the EAS system; (d) providing at least one “on call person” equipped with a pager or similar device who can be remotely contacted in the event that the automated system

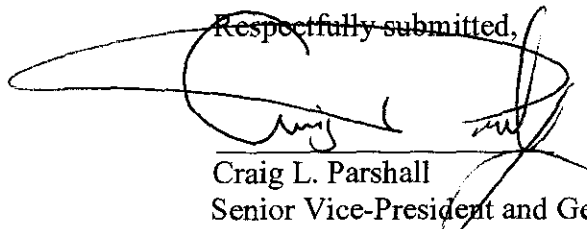
malfunctions; (e) providing at least one “on call person” equipped with an alarmed radio capable of notifying that person promptly in the event of severe weather in the broadcast area.

These options have been used successfully by NRB member broadcasters for years without any untoward incident, or malfunction.² Permitting licensees to utilize these kinds of options in lieu of physical on-site, “24/7” staffing will avoid the kind of crippling costs and entangling interference that will most certainly result from if the Commission imposes the rule it proposes. See: NRB Comments pages 10-12.

II. CONCLUSION

For the foregoing reasons, we request that the Commission abandon the following proposed rules, to-wit: Those relating to the requirement of twenty-four hour staffing at each broadcast facility, and those relating to mandated advisory boards, and substitute the recommendations made by NRB herein, and further request that the Commission abandon those proposed rules relating to mandated localism content in programming as a condition of, or in conjunction with, licensure.

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² In a quick sampling of a handful of our broadcast members we learned that these concepts have been used successfully by: Blount Communications (a small network of radio stations in the Northeast); WLMB-TV (channel 40), Toledo, OH; Christian Radio KJOL, Grand Junction, CO. and KDTA, Delta, CO.; and KNZZ and KJYE, radio stations in Western Colorado.